repeatedly during this time. Miller began harassing Conner about the third day she worked under his supervision. (Add. P.25; R. 000320, line 2). It began when Miller called Conner into his office alone, shut the door, and asked if she "wanted to see something grow?" Miller then pulled down his pants and exposed himself to her. (Add. P.25-6; R. 000320, line 4 to 000321, line 23). That same evening, Miller grabbed Conner's breasts and buttocks. (Add. P.27; R. 000322, lines 6-13). Once while Conner was in the Habilitation Center's swimming pool with the clients, Miller swam behind her, grabbed at her breasts, and attempted to put his hands between her legs. (Add. P.28-9; R. 000322, line 23 to 000323, line 3).

Conner's job occasionally required her to be alone in an automobile with Miller. On one occasion, Conner was asked to assist Miller in transporting a client in the department's van. While alone in the van with Conner, Miller reached over and tried to pull up her shirt and bra. Miller then exposed his penis and asked Conner if she would "like to see how fast a worm could grow?" (Add. P.28; R. 000327, lines 2-21). Another time, Conner was required to ride with Miller in a department truck to deliver a client's furniture to another facility. During this trip Miller again groped Conner, exposed his penis, and asked her to stroke it. (Add. P.29-20; R. 000328, line 23 to 000329, line 6). After this continual harassment, Conner was diagnosed with Post Traumatic Stress Disorder. (R. 000356).

Conner, too, was a victim of childhood sexual abuse. From ages 5 to 13, Conner was the victim of serious sexual abuse inflicted by an individual with whom she had close and consistent interaction. (R. 000331, line 8 to 000334, line 17). Conner testified that she failed to report the alleged harassment because she feared she might lose her job were she to report her supervisor's behavior. (R. 247, lines 21-23).

Investigation and History of Miller's Conduct

Following Williams' complaint, an investigation was conducted in August 2000. (R. 000121). During the investigation, Miller admitted that he repeatedly exposed himself to Williams, Conner, and another employee, "R.Y." (R. 000336, line 20 to 000337, line 1; 000340, lines 7-11; 000342, lines 7-10). Although Miller did not admit it, the investigation uncovered that Miller had harassed a fourth employee, "C.E.", and there may have been others. (R. 000349-50).

The investigation also revealed that Miller's supervisor, Sara Moore, had knowledge that Miller sexually harassed "C.E.", but failed to report it to higher level supervisory staff. (R. 000349-50, 53). In addition, the investigation disclosed that at least four co-workers knew of Miller's harassment of Williams. (R. 000350).

MDMH's Sexual Harassment Policy

MDMH's sexual harassment training for employees, including Miller, Williams and Conner, lasted for approximately one hour in total. (R. 000358). The sexual harassment policy that was announced during the training program did not mandate that supervisors with knowledge of sexual harassment report it to their superiors. (Add. P.16-7; R. 000120-1). The policy also did not mandate that employee reports or complaints be kept confidential to the greatest extent possible. (*Id.*) Further, MDMH's sexual harassment policy stated that following a receipt of a complaint, an immediate and thorough investigation will be initiated within five working days. (Add. P.17; R. 000121). The sexual harassment policy at MDMH did not require any action to be taken prior to the completion of a thorough investigation. (Add. P.17; R. 000121). MDMH's sexual harassment policy stated that persons who make false reports of harassment are subject to termination. (Add. P.17-7; R. 000120-1).

SUMMARY OF ARGUMENT

Over seven years ago, in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), this Court held that an employer is vicariously liable for a supervisor's sexual harassment of an employee. However, in the absence of a tangible adverse employment action against the employee, the employer may prevail by establishing an affirmative defense. The affirmative defense requires that the employer demonstrate both (a) that the employer exercised reasonable care to prevent and promptly to correct any sexually harassing behavior, and (b) that the plaintiff employee failed to take advantage of any preventative or corrective opportunities provided by the employer.

In the years since *Faragher* and *Ellerth*, hundreds of reported lower court opinions have considered the application of the two prongs of the affirmative defense in sexual harassment cases. This Court has not returned to the issue or clarified how the two parts of the affirmative defense are to be applied.[1] As a result, significant splits have developed among the Circuits concerning both prongs of the *Faragher/Ellerth* affirmative defense.

This case presents an urgently needed opportunity for this Court to resolve a number of significant conflicts among the Circuits and to clarify issues of national importance that occur constantly in employment discrimination litigation. First, in implementing the first prong of the *Faragher/Ellerth* defense and assessing the reasonableness of an employer's actions, there is a split among the Circuits as to the importance of the employer having a

[1] In *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342 (2004), this Court applied *Faragher* and *Ellerth* to the constructive discharge situation, but did not otherwise clarify how the two prongs of the affirmative defense are to be applied.

written sexual harassment policy. Some Circuits have held that the existence of a written policy, combined with a grievance procedure, is sufficient to show that the employer acted reasonably to prevent sexual harassment. *See, e.g., Ritchie v. Stamler Corp.*, 205 F.3d 1341 (6th Cir. 1999) (unpublished table opinion); *Casiano v. AT&T Corp.*, 213 F.3d 278, 286 (5th Cir. 2000); *Marrero v. Goya of P.R. Inc.*, 304 F.3d 7, 21 (1st Cir. 2002); *Conatzer v. Med. Prof. Bldg. Serv. Corp.*, 95 Fed.Appx. 276, 280 (10th Cir.), *cert. denied*, 125 S.Ct. 329 (2004).

Other Circuits, like the Eighth Circuit in this case, see the existence of a written policy as sufficient to shift the burden of proof to the plaintiff employee to show that the defendant employer's policy is unreasonable. *See, e.g., Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 266 (4th Cir. 2001); *Mack v. Otis Elevator Co.*, 326 F.3d 116, 128 (2nd Cir.), *cert. denied*, 540 U.S. 1016 (2003).

In marked contrast, the Eleventh Circuit has required that an employer prove that the written policy and procedures are reasonable. The Eleventh Circuit has held that because of the wide range of characteristics of different workplaces, courts must analyze whether a defendant employer's anti-harassment policy is sufficient under the circumstances to "adequately fulfill Title VII's deterrent purpose." *Madray v. Pub. Supermarkets, Inc.*, 208 F.3d 1290, 1298 (11th Cir.), *cert. denied*, 531 U.S. 926 (2000).

On the second prong of the affirmative defense – which allows an employer that has acted reasonably to prevent sexual harassment to prevail only by demonstrating that the employee failed to reasonably use the remedial measures – there is also a major split among the Circuits. One issue dividing the Circuits concerns the consequences of the employee's failure to use the employer's remedial mechanisms. The Fourth Circuit has held that the failure to report harassment is sufficient to

show the plaintiff's unreasonableness. *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d at 267.

Other Circuits, like the Eighth Circuit here, treat the failure to report or delay in reporting as sufficient to shift the burden of proof to the employee to show that she acted reasonably. *See Leopold v. Baccarat*, 239 F.3d 243, 246 (2d Cir. 2001); *Conatzer v. Med. Prof'l Bldg. Servs. Corp.*, 95 Fed.Appx. 276, 281 (10th Cir.), *cert. denied*, 125 S.Ct. 329 (2004); *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1316 (11th Cir. 2001).

Still other Circuits reject these approaches and hold that it is the defendant's burden to prove that the employee acted unreasonably in delaying or failing to report harassment. *See, e.g., Reed v. MNBA Marketing Systems, Inc.*, 333 F.3d 27, 37 (1st Cir. 2003); *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999); *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1179, n. 24 (9th Cir. 2003).

There is another split among the Circuits as to what is sufficient to show that the plaintiff employee acted unreasonably in delaying or failing to report harassment. Some Circuits say that subjective credible fear by an employee of reprisal is sufficient. *See, e.g., Reed*, 333 F.3d at 37; *Mota v. Univ. of Tex. Houston Health Ctr.*, 261 F.3d 512, 525-26 (5th Cir. 2001); *Holly D.*, 339 F.3d at 1179. Other Circuits, like the Eighth Circuit here, focus on whether the employee's fear of reprisal was objectively reasonable. *See, e.g., Leopold*, 239 F.3d at 246; *Idusuyi v. Tenn. Dep't of Children's Serv.*, 30 Fed.Appx. 398, 404 (6th Cir. 2002); *Walton v. Johnson & Johnson Servs.*, 347 F.3d 1272, 1291 (11th Cir. 2003).

Underlying the disputes concerning both prongs of the *Faragher/Ellerth* affirmative defense is the crucial question of when summary judgment is appropriate. The Eighth Circuit, which held here that the reasonableness of the employer's and employee's actions were not issues for

the jury, stands in sharp conflict with this Court's admonition that "credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *see also O'Shea v. Yellow Tech. Servs.*, 185 F.3d 1093, 1097 (10th Cir. 1999); *Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 564 (6th Cir. 2004) (emphasizing the role of the jury in employment discrimination actions).

Thus, this case presents this Court an important opportunity to resolve conflicts among the Circuits and to clarify issues that arise constantly in employment discrimination litigation across the country.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CIRCUIT SPLIT ON A QUESTION OF NATIONAL IMPORTANCE AS TO WHETHER THE PROMULGATION OF AN ANTI-HARASSMENT POLICY SATISFIES AN EMPLOYER'S DUTY TO TAKE REASONABLE CARE TO PREVENT SEXUAL HARASSMENT OR WHETHER THAT POLICY ITSELF MUST BE REASONABLE IN THE CIRCUMSTANCES.

This Court has held that an employer is vicariously liable when a supervisor creates a hostile work environment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Absent a tangible employment action taken against the employee, the employer can raise a two-part affirmative defense. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 at 765. The first prong of that defense requires the employer to prove, by a preponderance of the evidence, that it exercised reasonable care to prevent and promptly

remedy the harassment. This Court has given little substantive guidance as to what constitutes a "reasonable" policy. This Court was clear, however, that the mere existence of an anti-harassment policy without more does not "result automatically in employer immunity." *Faragher*, 524 U.S. at 792. Furthermore, this Court explained that Title VII's primary goal of deterrence requires employers to create a policy that encourages victims of harassment to come forward. *Id.* at 806.

The lower courts have split into three groups on the effect that the existence of a written, disseminated policy has on an employer's liability. Some Circuits have held that the existence of a written sexual harassment policy is sufficient to meet the first prong of the *Faragher/Ellerth* test and do not inquire into the substantive reasonableness of the policy given the employment circumstances. Other Circuits have held that the existence of a written policy is sufficient to shift the burden of proof to the plaintiff to demonstrate that it is unreasonable. In contrast, other Circuits reject these approaches and require more than a written policy; they carefully examine the terms of employer policies to determine their reasonableness in the context of the particular workplace. There is also disagreement and a split among the Circuits as to when summary judgment is appropriate in determining reasonableness of an employer's policies and when reasonableness should be determined by the jury.

This Court should grant review in this case to clarify and unify the standard that courts must apply in deciding whether an employer has exercised reasonable care to prevent sexual harassment. This is an issue that arises frequently in sexual harassment litigation and this Court needs to clarify whether the existence of a harassment policy is sufficient by itself to satisfy the first prong of the *Faragher* and *Ellerth* test, and if not, the type of inquiry that trial courts must make as to whether the employer

exercised reasonable care to prevent and remedy sexual harassment.

This case vividly illustrates the different approaches that lower courts have taken in interpreting and applying the first prong of the *Faragher/Ellerth* test. Some lower courts have held, in disregard of this Court's statements in *Faragher* and *Ellerth*, that the mere existence of a sexual harassment policy fulfills the employer's obligation to exercise reasonable care in preventing sexual harassment. For example, the Sixth Circuit has held that the existence of a sexual harassment policy with a grievance procedure satisfies the reasonable care requirement. In *Ritchie v. Stamler Corp.*, 205 F.3d 1341 (6th Cir. 1999), the court upheld a policy in which a victim could report harassment only to the president of the company. The Sixth Circuit did not even consider other aspects of the policy in concluding that it was reasonable, such as the absence of confidentiality protections and protection from non-retaliation. Nor did the Court consider the chilling effect that a policy requiring victims to report harassment directly to the president of the company might have on the willingness of victims to come forward.

The Sixth Circuit is not alone in this approach. Other Circuits also have held that an employer meets the first prong of the *Faragher* and *Ellerth* defense simply by showing the existence of a written anti-harassment policy. *See Casiano v. AT&T Corp.*, 213 F.3d 278, 286 (5th Cir. 2000) (holding that the employer satisfied its reasonable care obligations by promulgating an anti-harassment policy with a complaint procedure); *Marrero v. Goya of P.R. Inc.*, 304 F.3d 7, 21 (1st Cir. 2002) (holding that the first prong of the affirmative defense can typically be met by evidence that the employer promulgated an anti-harassment policy with a complaint procedure); *Conatzer v. Med. Prof. Bldg. Servs. Corp.*, 95 Fed.Appx. 276, 280 (10th Cir. 2004) (holding that an employer's anti-harassment

policy and grievance procedure satisfied the first prong of the test). These Circuits misapply the *Faragher/Ellerth* test by focusing exclusively on the existence of an anti-harassment policy with a grievance procedure and ignoring whether the policy is reasonably designed to prevent and respond to sexual harassment in that particular workplace. These Circuits effectively treat the existence of an anti-harassment policy as immunity against liability.

Other Circuits pay only slightly greater heed to this Court's instruction that the existence of an anti-harassment policy is not dispositive on the issue of reasonable care. These Circuits ignore this Court's holding that the *Faragher* and *Ellerth* create an *affirmative* defense, and place the burden on the plaintiff to prove that the policy is ineffective or poorly implemented. For example, the Fourth Circuit held that the existence of an anti-harassment policy provides "compelling proof" that an employer exercised reasonable care to prevent sexual harassment. *Lissau v. Southern Food Servs., Inc.*, 159 F.3d 177, 182 (4th Cir. 1998). That Circuit also held that "the only way" for a plaintiff to rebut this "compelling proof" of reasonable care is to show either that the employer acted in bad faith in adopting the policy or that the policy is otherwise defective or dysfunctional. *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001). *See also Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999) (approving an anti-harassment policy without considering its terms); *Dowdy v. North Carolina*, 23 Fed.Appx. 121, 123 (4th Cir. 2001) (an employer satisfied its obligation to exercise reasonable care even though it had failed to provide its employees with any training on the harassment policy.)

The Second Circuit also impermissibly places the burden on the plaintiff to prove that an employer did not exercise reasonable care once an anti-harassment policy is introduced into evidence. *See, e.g., Mack v. Otis Elevator*

Co., 326 F.3d 116, 128 (2nd Cir.), *cert. denied*, 540 U.S. 1016 (2003) ("One way for employers to demonstrate that they exercised reasonable care is to show that they had an anti-harassment policy in place."); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 295 (2nd Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000) (concluding that because the employer had a policy in place, it met the first prong of the defense.)

The approach followed in the Fourth and Second Circuits fails to provide meaningful scrutiny of an employer's anti-harassment policy. Instead, once the defendant shows that the policy exists, the burden shifts to the plaintiff to prove that the policy could not reasonably be expected to prevent or to stop sexual harassment.

Other Circuits have taken a markedly different approach and carefully analyze the details of employers' policies in the context of the particular workplace in assessing their reasonableness. For example, the Eleventh Circuit held that because of the varied circumstances among workplaces, courts must analyze whether an employer's anti-harassment policy is sufficient under the circumstances to "adequately fulfill Title VII's deterrent purpose." *Madray v. Pub. Supermarkets, Inc.*, 208 F.3d 1290, 1298 (11th Cir.), *cert. denied*, 531 U.S. 926 (2000).

The Eleventh Circuit noted that the employer's "size, location, geographic scope, organizational structure, and industry segment" were only a few of the factors that could affect the efficacy of a particular sexual harassment policy. *Id.* The Eleventh Circuit explained that, as this Court held, at a bare minimum, a policy must include a grievance procedure. The court recognized, however, that the mere existence of such a policy will only sometimes be sufficient to satisfy the reasonable care requirement. *See also Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1286-87 (11th Cir. 2003), *cert. denied*, 541 U.S. 959

(2004) (holding a policy based on a detailed consideration of it and concluding that it was designed to encourage employees to come forward).

Like the Eleventh Circuit, the Seventh and Ninth Circuits, at least in some cases, examine the reasonableness of the policy in the context of particular workplace circumstances and require the employer to prove more than the mere existence of a policy. Nevertheless, there are significant differences even within the Seventh and Ninth Circuits as to which party has the burden of proving what.

The Seventh Circuit has held in some cases that if a policy exists, the burden shifts to the plaintiff to demonstrate that it is defective or dysfunctional. In *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 698-99 (7th Cir. 2001), the court shifted the burden to the plaintiff to demonstrate that the policy was "ineffective or deficient." In *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 811 (7th Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000), the court held that "the existence of an appropriate anti-harassment policy will often satisfy this first prong . . . because Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms." In these cases, the Seventh Circuit never considered crucial factors that determine the reasonableness of such policies, such as assurances of non-retaliation and separation of the victim from the harasser during the investigation.

However, other Seventh Circuit decisions have taken a different approach. In *Gentry v. Export Packaging Co.*, 238 F.3d 842, 847 (7th Cir. 2001), the court held that in order to effectuate Title VII's goal of preventing harm, courts must first address whether an employer "devised an effective sexual harassment policy." The court stressed that the "mere creation of a sexual harassment policy" will not insulate an employer from liability. *Id.* The court explained that the real question is whether the employer

"with its sexual harassment policy in place, took reasonable care to prevent sexual harassment." *Id.* The court identified several concerns with the policy and concluded that a reasonable jury could have found that the anti-harassment policy would not have effectively prevent sexual harassment in that workplace. *Id.* at 848.

Like the Seventh Circuit, the Ninth Circuit has been inconsistent as to the appropriate inquiry in determining an employer's reasonableness. On at least one occasion, the Ninth Circuit has held that the existence of a sexual harassment policy and efforts to distribute it to all employees are sufficient to satisfy the employer's obligation to use reasonable care in preventing sexual harassment. *Montero v. Agco Corp.*, 192 F.3d 856, 862 (9th Cir. 1999). In another case, however, the court explained that a detailed examination of a policy is necessary in assessing its reasonableness. *Kohler v. Inter-Tel Technologies*, 244 F.3d 1167, 1180 (9th Cir. 2001). In *Kohler*, the court approved of the fact that the defendant's policy defined sexual harassment, identified to whom reports should be made, provided alternative people to report to in case the one listed is the harasser, described disciplinary measures that the company may use, promised that complainants will not be retaliated against, that complaints will be investigated immediately and that complainants will be protected from "coercion, intimidation, retaliation, interference, or discrimination." *Id.* This detailed inquiry was absent in this case and in those Circuits that hold that the existence of a policy is sufficient without any consideration of its content or implementation.

The Eighth Circuit has also struggled with how to apply the first prong of *Faragher/Ellerth* affirmative defense. In the first case to address the issue, the court concluded that it is for the jury to determine whether the existence of an anti-harassment policy satisfied the employer's obligation to exercise reasonable care in preventing

sexual harassment. *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 889 (8th Cir. 1998).

Despite its holding in *Phillips* that a determination of reasonable care is best left to the finder of fact, in this case, the Eighth Circuit upheld a grant of summary judgment without any meaningful inquiry into the adequacy of the employer's policy. In so doing, the Eighth Circuit disregarded that a reasonable jury could draw competing inferences about the efficacy of the terms and procedures of MDMH's sexual harassment policy. The court focused narrowly on the availability of multiple parties to whom Williams and Conner could address their complaints. 407 F.3d at 976-77 (App. at 8). The court entirely discounted the chilling effect of failing to mandate the separation of Williams and Conner from their alleged harasser. (Add. P.17; R. 000121). According to the policy, five days could pass before an investigation was even initiated. (Add. P. 17; R. 000121). After that, the employees could be left with their harasser for the entire length of the "thorough" investigation. *Id.* Although MDMH did put Miller on administrative leave and took three rather than five days to initiate the investigation, at the time of the harassment Williams and Conner could not have known that MDMH would respond in this manner. As far as the policy informed them, they could have been forced to remain under the supervision of their harasser throughout the length of the investigation, even though he knew they had complained about him. Since they often worked alone with him, and his harassment had been constant, physical, and menacing, a reasonable jury could have concluded that MDMH's policy was deficient. Moreover, given that the burden of proof should be on the employer, the Eighth Circuit should not have concluded that no reasonable jury could have found the employer's conduct and policy to be reasonable.

Had this case been tried in the Eleventh Circuit, or by certain panels within the Seventh and Ninth Circuits, the plaintiffs likely would have been able to try their case to a jury and may well have prevailed. Judges in these Circuits likely would have refused to grant summary judgment and let the jury decide whether MDMH's policy was reasonable in the context of that workplace. In fact, several other Circuits have stressed the inappropriateness of summary judgment in sexual harassment cases. The Tenth Circuit continues to recognize that "summary judgment should seldom be used in employment discrimination cases." *O'Shea v. Yellow Tech. Servs.*, 185 F.3d 1093, 1097 (10th Cir. 1999). The Sixth Circuit also does this. *Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 564 (6th Cir. 2004) (Title VII involves "factual determinations unsuitable for disposition at the summary judgment stage.") *See also Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133, 150 (2000) ("credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.")

While not every issue in every Title VII case is inappropriate for summary adjudication, the determination of whether an employee has carried its burden of proving the reasonableness of its training, policy, and response to complaints is inherently a factual question for the jury. A reasonable jury in this case could have found that given how few people worked at MDMH and the close contact that the plaintiffs would consequently have with their supervisor; given the continual instances of particularly offensive, disgusting and threatening harassment and the repeated physical and sexual assaults that the plaintiffs and others had endured; and given that there was evidence that the defendant's supervisory employees knew that Miller had harassed other employees and had done nothing about it, MDMH's policy was unreasonable in not guaranteeing separation from the alleged harasser

during the investigation. Furthermore, a reasonable jury could have found that MDMH's exceedingly brief sexual harassment training was unreasonably short and that its policy allotted an unreasonably long amount of time for an investigation to commence. Such shortcomings in the policy could have led a jury to find that it was not sufficient to meet the first prong of the *Faragher/Ellerth* requirement for reasonable care.

Without clarification from this Court, the outcome of the sexual harassment cases will depend largely on the arbitrary factor of which Circuit hears the case, or worse, in those Circuits split within themselves, on which panel within the Circuit hears the case. Contrary to this Court's holdings in *Faragher* and *Ellerth*, the present application of the affirmative defense by many of the Circuits allows even the most pro forma anti-harassment policies to shield employers against liability. This Court should grant review of this case to resolve this conflict among the lower courts and to decide this issue of national importance concerning what is sufficient to meet the first prong of the *Faragher/Ellerth* defense.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CIRCUIT SPLIT ON A QUESTION OF NATIONAL IMPORTANCE CONCERNING WHETHER AND HOW AN EMPLOYER MUST SHOW UNREASONABLENESS OF THE FAILURE TO REPORT HARASSMENT IN ORDER TO ESTABLISH THE SECOND PRONG OF THE *FARAGHER/ELLERTH* AFFIRMATIVE DEFENSE.

Under *Faragher* and *Ellerth*, even if the employer has acted reasonably to prevent and remedy sexual harassment, the employer is not excused from liability for a supervisor's sexual harassment unless the plaintiff

employee unreasonably failed to take advantage of the preventative or corrective opportunities provided by the employer. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. There are two distinct issues that are splitting the Circuits and causing great confusion in the law. First, what is the effect of an employee's delay in reporting, or failure to report, harassment? Some Circuits, including the Eighth Circuit in this case, hold that the failure of an employee to use the grievance procedure is sufficient to meet this prong of the test, or at least to shift the burden to the employee to prove that she acted reasonably. Other Circuits, in contrast, hold that the failure of an employee to file a timely report is only one part of the reasonableness inquiry and that the employer retains the burden to show that the employee acted unreasonably.

Second, what is sufficient to show that an employee's delay in reporting or failure to report was reasonable under the circumstances? Here, too, there is a split among the Circuits: some say that an employee's subjective fear of reprisal is sufficient, while others require that the employee's action be objectively reasonable. There also is a split among the Circuits as to what length of delay renders a sexual harassment victim's report unreasonable.

A. Is An Employee's Failure To Report Or Delay in Reporting Harassment Sufficient To Show The Employee's Unreasonableness Or To Shift The Burden Of Proof To The Plaintiff?

The Eighth Circuit in this case concluded that MDMH met its burden under the second prong of the affirmative defense merely by showing Williams' four month delay in reporting and Conner's failure to report. 407 F.3d at 977 (App. at 9-10). The court treated a showing of *any* failure to promptly report the harassment as

sufficient to demonstrate unreasonableness on the part of the plaintiff employees. The court declared: "Given the nature of the allegations against [the supervisor], it was unreasonable not to promptly report his conduct." *Id.* The Eighth Circuit in other cases also has held that a plaintiff employee's failure to complain will normally suffice to meet the defendant-employer's burden under the second prong. *See Jackson v. Ark. Dep't of Educ., Vocational, and Technical Educ. Div.*, 272 F.3d 1020, 1026 (8th Cir. 2001), *cert. denied*, 536 U.S. 908 (2002).

The Eighth Circuit's approach conflicts with this Court's decisions in *Faragher* and *Ellerth*, which plainly instruct that the defendant employer must show that "the plaintiff employee *unreasonably* failed to take advantage of any preventive or corrective opportunities." *Ellerth*, 534 U.S. at 764-65; *Faragher*, 524 U.S. at 807-808 (emphasis added). In *Jackson*, the Eighth Circuit stated that the defendant employer need only show a "failure" on the part of a plaintiff employee, rather than an "unreasonable failure." 272 F.3d at 1026. But in *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342, 2354 (2004), this Court reaffirmed that the decisions in *Faragher* and *Ellerth* "place the burden squarely on the defendant to prove that the plaintiff unreasonably failed to avoid or reduce harm."

The approach of the Eighth Circuit also conflicts with decisions of other Circuits. At least three other Circuits have concluded that the defendant employer must show the unreasonableness of a failure to report. In these Circuits, in contrast to the Eighth Circuit's decision in this case, a showing of failure to report is not a rebuttable presumption of unreasonableness. In *Reed v. MNBA Marketing Systems, Inc.*, 333 F.3d at 37, the First Circuit held that the plaintiff employee's failure to report did not satisfy the defendant employer's burden of proof with respect to the second prong. The District of Columbia Circuit also held that a defendant employer had failed to establish the

second prong of the affirmative defense where it had not shown that plaintiff employee's failure to promptly report harassment was unreasonable. *Greene v. Dalton*, 164 F.3d at 675. The court explained that a defendant employer must show not only that the plaintiff employee delayed significantly, but that "a reasonable person" in the plaintiff employee's position would have come forward earlier. *Id.* In other words, a showing of a failure to report does not create a presumption of unreasonableness; the unreasonableness *itself* must be shown by the defendant employer. *Id.*

The Ninth Circuit, too, has stressed that a delay in reporting or even a failure to report are not sufficient for the employer to meet the second prong of the *Faragher/Ellerth* affirmative defense. The employer must show that the employee's action was unreasonable under the circumstances. The Ninth Circuit explained: "We recognize that victims of sexual harassment may face considerable difficulty in reporting the wrongdoing or taking other affirmative steps to seek relief. Indeed, in some cases, a victim's particular circumstances may render the failure to seek relief through the employer's available procedures objectively reasonable." *Holly D.*, 339 F.3d at 1179, n. 24.

In contrast, the Fourth Circuit, like the Eighth Circuit, treats a failure to take advantage of complaint procedures as creating a presumption of unreasonableness. The Fourth Circuit, however, has gone even further than the Eighth Circuit and has consistently held that "any evidence that the plaintiff failed to utilize the company's complaint procedure will normally suffice to satisfy [the company's] burden under the second element of the defense." *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d at 267. This standard has been rigidly upheld. The Fourth Circuit has almost always rejected arguments from plaintiff employees seeking to justify their failure to

properly utilize complaint procedures. *See, e.g., Silver v. General Motors Corp.*, 225 F.3d 665 (4th Cir. 2000) (unpublished table opinion); *Dowdy v. North Carolina*, 23 Fed.Appx. 121, 123 (4th Cir. 2001).

A third group of Circuits takes the failure to report as sufficient to meet the employer's burden of proof under the second prong of the *Faragher/Ellerth* test and to shift the burden of proof to the plaintiff to show the reasonableness of her actions. *See Leopold v. Baccarat*, 239 F.3d 243, 246 (2d Cir. 2001) ("Once an employer has satisfied its initial burden of demonstrating that an employee has completely failed to avail herself of the complaint procedure, the burden of production shifts to the employee to come forward with one or more reasons why the employee did not make use of the procedures."); *Conatzer v. Med. Prof'l Bld. Servs. Corp.*, 95 Fed.Appx. 276, 281 (10th Cir. 2004) (holding that the defendant employer had established the second prong of the affirmative defense where the plaintiff employee failed to explain why she waited three weeks to report the sexual harassment); *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1314 (11th Cir. 2001) ("As to the second element of the defense, an employer's showing that the plaintiff-employee failed to follow its complaint procedures will often be sufficient to satisfy its burden.")

Here, too, the confusion in the law has resulted in splits even within some Circuits. For example, the Fifth Circuit has held that a delay of several months by an employee in reporting harassment is sufficient as a matter of law to establish unreasonableness and justify summary judgment for the employer. *See Casiano v. AT&T Corp.*, 213 F.3d 278, 287 (5th Cir. 2003). However, in other cases, the same Circuit has found that showing a delay by an employee in reporting is not sufficient to meet the second prong of the *Faragher/Ellerth* affirmative defense; the defendant still has the burden to show the unreasonableness of delay by the plaintiff employee. *Mota v. Univ. of*

Tex. Houston Health Sci. Ctr., 261 F.3d 512, 526 (5th Cir. 2001) (upholding a jury determination that the defendant employer had failed to show the unreasonableness of a failure to report); *Watts v. Kroger Co.*, 170 F.3d 505, 510 (5th Cir. 1999) (holding that the defendant must show the unreasonableness of a delay in reporting). In *Casiano*, therefore, the Fifth Circuit allowed delay in reporting to create a rebuttable presumption of unreasonableness; while in *Mota* and *Watts* it did not.

This same split exists within the Seventh Circuit. In *Shaw v. AutoZone, Inc.*, 180 F.3d at 813, the court held that the plaintiff employee's failure to alert the defendant employer to the allegedly hostile environment "satisfies [the defendant's] burden under the second prong of the *Ellerth* affirmative defense." On the other hand, in *Johnson v. West*, 218 F.3d 725, 731-32 (7th Cir. 2000), the court remanded the case and explained the "it is the [defendant]'s burden to show that [the plaintiff] acted unreasonably." *See also Hardy v. Univ. of Ill. at Chicago*, 328 F. 3d 361, 365-66 (7th Cir. 2003) (holding that the lower court's granting of summary judgment on the affirmative defense was error where the defendant employer had established only that there had been a delay in reporting).

This case likely would have been decided differently had it been argued before another Circuit. Where, as here, the defendant employer offered evidence only of one plaintiff's failure and another plaintiff's delay in reporting, and the record also contained evidence that the plaintiffs had good reasons for their conduct, it seems clear that neither the First nor the District of Columbia Circuits would have granted summary judgment to MDMH. The First and District of Columbia Circuits would have required MDMH to meet its burden of proof and prove that Williams and Conner acted unreasonably. *See Reed v. MNBA Mktg. Systems, Inc.*, 333 F.3d at 37; *Greene v. Dalton*, 164 F.3d at 675. At the very least, these Circuits

would have allowed the issue of Williams's and Conner's reasonableness to be determined by the jury.

B. What Is Sufficient To Show That An Employee Unreasonably Failed To Use Remedial Procedures?

Whether the burden of proof is on the plaintiff or the defendant to demonstrate unreasonableness in the failure to report or delay in reporting, the issue arises as to how reasonableness is to be determined. The Circuits have invented a variety of different and inconsistent approaches for how to determine the reasonableness of an employee's actions.

The Eighth Circuit allowed MDMH to establish the second prong of the affirmative defense by showing that Williams delayed for four months before reporting and that Conner failed to report.[2] 407 F.3d at 979 (App. at 9). It did not require MDMH to show that Williams and Conner were unreasonable in their failures to properly avail themselves of the anti-harassment policy. To rebut MDMH's claim that Williams and Conner were unreasonable, the plaintiff employees argued that they feared retaliation. The Eighth Circuit rejected this argument and found that MDMH had established the second prong.

Many Circuits have considered whether an employee's fear of reprisals is sufficient to excuse the failure to report, and most state that "ordinary" or "general" fear is insufficient to establish reasonableness and that something more is necessary. *See Reed v. MBNA Mktg. Systems, Inc.*, 333

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[2] Actually, the delay in reporting was much less than four months. For reasons unrelated to the harassment, Miller was transferred from being Williams and Conner's supervisor three and a half weeks after the harassment began. Thus, their delay in reporting was only 24 days, by far the shortest period deemed an unreasonable delay in any Circuit.

F.3d at 36; *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d at 267; *An v. Regents of the Univ. of Cal.*, 94 Fed.Appx. 667, 675 (10th Cir. 2004). Several of the Circuits have interpreted this "something more" as being credible fear. *See, e.g., Reed*, 333 F.3d at 36 ("Where there is a truly credible threat of retaliation that the complaint mechanism will not prevent, the employee's position is more hazardous and inaction more easily explained."); *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d at 1179 n.24 (explaining that the employee plaintiff "offered no facts that would support a reasonable belief that [employer] was so biased that resort to its procedures would have been futile").

The Circuits which have applied the standard of credible fear have interpreted its effectiveness to show reasonableness in one of two ways: (1) credible subjective fear of futility or retaliation, or (2) credible objective fear. The First, Fifth and Ninth Circuits accept that subjective credible fear may be enough. *See Reed v. MBNA Mktg. Systems*, 333 F.3d at 37 (holding that a jury could find reasonable the failure to report by a young victim who had been harassed and threatened by a supervisor almost twice her age); *Mota v. Univ. of Tex. Houston Health Ctr.*, 261 F.3d at 525-26 (a jury could find plaintiff's failure to avail himself of remedies to be reasonable where he "may have believed that resort to [defendant's] administrative process was ineffectual"); *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d at 1179 n.24 ("a victim's particular circumstances may render the failure to seek relief through the employer's available procedures objectively reasonable").

On the other hand, the Second, Sixth and Eleventh Circuits have expressly stated that subjective fears are insufficient. *See Leopold v. Baccarat, Inc.*, 239 F.3d at 246 ("A credible fear must be based on more than the employee's subjective belief. Evidence must be produced to the effect that the employer has ignored or resisted similar

complaints or has taken adverse actions against employees in response to such complaints."); *Idusuyi v. Tenn. Dep't of Children's Serv.*, 30 Fed.Appx. At 404 (holding that "it is unreasonable for employees to pass their own judgments – absent any supporting facts – about how effectively an employer's sexual harassment policies operate); *Walton v. Johnson & Johnson Servs.*, 347 F.3d at 1291 (holding that "absent a credible threat of retaliation, Walton's subjective fears of reprisal do not excuse her failure to report"); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d at 267 ("A generalized fear of retaliation does not excuse a failure to report sexual harassment.")

Here, too, the law is so unclear that there are even splits within Circuits. In *Johnson v. West*, 218 F.3d at 732, the Seventh Circuit held that the plaintiff employee's fear may have been reasonable and therefore that the reasonableness of the fear was a matter for the jury because emotional stress had to be taken into consideration. On the other hand, both before and after *Johnson*, the Seventh Circuit held that an "employee's subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee's duty under *Ellerth*." *Shaw v. AutoZone, Inc.*, 180 F.3d at 813; *See also Durkin v. Chicago*, 341 F.3d 606, 612 (7th Cir. 2003) ("[p]laintiff's feelings of futility or unpleasantness do not alleviate her duty to bring her mistreatment to the [defendant's] attention.")

In addition to disagreement among the Circuits as to how reasonableness should be evaluated, there is also a split among the Circuits in determining what length of delay may be considered reasonable. The Fourth Circuit held that a delay of one month was too long and therefore the plaintiff employee unreasonably failed to avail herself of the reporting procedures. *See Matvia v. Bald Head Island Mgmt.*, 259 F.3d 261, 270 (4th Cir. 2001). At the other end of the spectrum, the Seventh Circuit held that a delay of one year could be reasonable and therefore that

reasonableness was a question for the jury. *Johnson v. West*, 218 F.3d at 732. Other Circuits fall somewhere between. *See Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d at 525-26 (a delay of nine months is not unreasonable in light of employer's "repeated threats of retaliation"); *Hardy v. Univ. of Ill. at Chicago*, 328 F.3d at 365-66 (a delay of three months is not unreasonable); *Murray v. Chicago Transit Authority*, 252 F.3d 880, 889 (7th Cir. 2001) (nine months delay was unreasonable); *Jackson v. Ark. Dep't of Educ., Vocational and Technical Educ. Div.*, 272 F.3d at 1026 (a delay of nine months was unreasonable where employee plaintiff also refused to attend a meeting with company officials and her harasser); *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d at 1290 (a delay of three months was unreasonable). Finally, this Court in *Ellerth* declined to hold that a delay of one year was necessarily unreasonable. 524 U.S. at 748-49.[3] Thus, plaintiff Williams might have gotten to a jury in the Seventh and Fifth Circuits, or even have received summary judgment in her favor, but might have lost on summary judgment in the Fourth and Eleventh Circuits.

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[3] There also is a split among the Circuits regarding whether an employee must rigidly follow the rules of the employer's policy and report only to the individuals specified in that policy. For example, the Fifth Circuit held a plaintiff employee's complaint to a union instead of to the employer was reasonable. *Watts v. Kroger Co.*, 170 F.3d 505, 511 (5th Cir. 1999). On the other hand, both the Tenth and the Eleventh Circuits have refused to accept as reasonable the actions of employees who reported sexual harasser to the wrong members of personnel. *See Walker v. United Parcel Serv., Inc.*, 76 Fed.Appx. 881, 888 (10th Cir. 2003) (finding that complaining to employee's union steward, who was not named under the policy, was not a reasonable attempt to complain about sexual harassment); *Benefield v. Fulton Co.*, 130 Fed.Appx. 308, 312 (11th Cir. 2005) ("[C]omplaints to persons not authorized to accept complaints does not constitute a reasonable effort to take advantage of employer's complaint procedures.")

The Eighth Circuit did not consider any factors other than fear of retaliation and length of delay when it held that MDMH had established the second prong of the affirmative defense. This is quite uncommon among the Circuits. Almost every Circuit has considered other factors in assessing reasonableness. The factors most commonly considered are: (1) whether the reporting was done to the correct member of personnel, (2) whether the employee perceives the harasser as having close ties to upper management, (3) whether the plaintiff employee misled investigations into the harassment, (4) whether the plaintiff employee otherwise failed to avoid harm.

The Eighth Circuit's departure from the majority of Circuits on the issue of factors other than fear of retaliation is particularly problematic for the thousands of men and women who, like Williams and Conner, had terrifying past experiences with sexual abuse, assault, and harassment that made them especially fearful of coming forward. The Eighth Circuit did not consider Williams and Conner's history of child abuse in assessing their fear of reporting. The First, Fifth and Ninth Circuits have accepted that subjective fear of retaliation may sometimes show reasonableness, and therefore may have taken the plaintiff employees' child abuse history into consideration when assessing the reasonableness of their failure to properly avail themselves of the defendant employer's reporting procedures.

There are a myriad of reasons why a reasonable person may delay reporting or fail to report at all. Prior victims of abuse might suffer paralyzing trauma when subjected to a new form of abuse. Some might have religious scruples or modesty that might make it difficult to mention sex or sexual overtures. There might be language barriers. This Court needs to clarify how much of the varied life experiences of the American workforce as a whole, and how much of each victim's own experience, may

be considered in explaining a failure to report. Whether the standard is objective or subjective, or some combination of both, it cannot be that the standard of reasonableness is what the legally knowledgeable worker who hardly fears losing her job would do. That is evidently the standard applied by the Eighth Circuit in this case and in some other Circuits.

CONCLUSION

For these reasons, this Court should grant certiorari to resolve conflicts among the Circuits on issues of national importance that constantly arise throughout the United States.

Respectfully submitted,

ERWIN CHEMERINSKY
Counsel of Record
Duke University
School of Law
Science Drive and
Towerview Road
Durham, North Carolina
27708
(919) 613-7173

CATHERINE FISK
Duke University
School of Law
Science Drive and
Towerview Road
Durham, North Carolina
27708
(919) 613-7196

KELLY L. JACKSON
4601 College Blvd.,
Suite 170
Leawood, Kansas 66211
(913) 345-8300

RONALD SANDHAUS
4601 College Blvd.,
Suite 170
Leawood, Kansas 66211
(913) 345-8300

Attorneys for Petitioners

407 F.3d 972

United States Court of Appeals,
Eighth Circuit.

Suzzette WILLIAMS; Angela Conner, Appellants,

v.

MISSOURI DEPARTMENT OF MENTAL HEALTH; Dan Thornton, Individually and in his official capacity as Superintendent of the Higginsville Habilitation Center, operated by the Missouri Department of Mental Health, Appellees.

No. 04-1510.

Submitted: Jan. 14, 2005.
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Rehearing and Rehearing
En Banc Denied July 22, 2005.

Ronald E. Sandhaus, argued, Leawood, MO (Kelly Jackson, Overland Park, KS, on the brief), for appellant.

Gail Vasterling, argued, Assistant Attorney General, Jefferson City, MO, for appellee.

Before MELLOY, SMITH, and COLLOTON, Circuit Judges.

SMITH, Circuit Judge.

Suzzette Williams ("Williams") and Angela Conner ("Conner") each asserted a claim for hostile work environment under Title VII against the Missouri Department of Mental Health ("MDMH") and Dan Thornton ("Thornton"), Superintendent of the Higginsville Habilitation Center ("HHC"), which is operated by MDMH. The United States

District Court[1] for the Western District of Missouri granted summary judgment in favor of MDMH and Thornton finding that they met the requirements of the affirmative defense established in *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). Williams and Conner appeal the district court's grant of summary judgment.

I. *Background*

Williams and Conner allege that their former temporary supervisor, Ronald Dale Miller ("Miller"), created a hostile work environment at HHC's Crestview II residential unit where they worked. Miller worked at the Crestview II Unit for several weeks in the Spring of 2000.[2] Both Williams and Conner allege that Miller asked inappropriate personal questions, exposed himself, and offensively touched Williams and Conner.[3] MDMH did not dispute

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[1] The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

[2] Miller was Williams's direct supervisor, but it is unclear whether he was Conner's supervisor. For purposes of this appeal, we assume Miller directly supervised Conner.

[3] On one occasion, Miller approached Williams and pulled down his pants to expose his genitals. He then said, "Man, look how hard it is." Miller also exposed himself to Williams a second time that evening. On another occasion, when Williams was in a client's room, Miller came to the doorway and exposed and fondled himself in front of her and the client. Miller also approached Williams when she was on a sofa with two clients. On this occasion he pulled open the neck of Williams's blouse to look at her breasts. Another time, Miller asked Williams to go with him to the copy machine, where he brushed up against her, touched her breasts and buttocks, and again exposed himself.

(Continued on following page)

that Miller committed these acts. Instead, MDMH raised the affirmative defense announced in *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), and argued that Conner and Williams were unreasonable in failing to report the harassment.

About five months after Miller's temporary assignment ended, Debi Hatheway ("Hatheway"), a supervisor at HHC approached Williams regarding the appropriateness of her work attire. Williams responded in a tirade and made statements about an unnamed former supervisor

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Miller admitted that he exposed himself to Conner on multiple occasions. The first incident occurred after Miller called Conner into his office and asked her to shut the door. He then pulled down his pants and exposed himself after asking Conner if she "wanted to see something grow." That same evening, Miller grabbed Conner's breasts and buttocks. On approximately three occasions while Conner and Miller were in HHC's swimming pool watching clients, Miller would swim up behind Conner and grab her breasts and try to put his hand between her legs. On another occasion, Conner was asked to assist Miller in transporting a client in the department's van. On the ride back to HHC, Miller reached over and tried to pull up Conner's shirt and bra. Miller then exposed his penis and asked Conner if she would "like to see how fast a worm could grow?" During another ride, Miller groped Conner, exposed his penis, and kept asking her to touch and stroke it.

Both Conner and Williams confirmed that there were no competent witnesses to testify to Miller's acts of misconduct. MDMH's sexual harassment policy requires employees who are harassed, or perceive that harassment may be occurring in the workplace, to report the incident to a supervisor, or if the supervisor is the harasser, other managers or administrators in their section, or to the personnel office. Williams acknowledged receiving and reading MDMH's sexual harassment policy. Conner received, but did not read the policy; she did, however, attend training on sexual harassment during orientation and knew there was a reporting procedure in place to use if she was being sexually harassed as an employee.

that prompted Hatheway to inquire further. Williams then, for the first time, related the facts of Miller's misconduct to an MDMH official. Hatheway promptly reported the allegations to MDMH and shortly thereafter Miller was placed on administrative leave pending an investigation into Williams's allegations. Conner never reported the harassment. Miller resigned from the department before any further action was taken.

Both women subsequently filed this hostile work environment sexual harassment lawsuit. The district court granted summary judgment on their claims, finding that although both Williams and Conner established a prima facie case, MDMH promptly prevented and corrected Miller's sexually harassing behavior. The district court also found that Williams and Conner unreasonably failed to take advantage of the preventative and corrective opportunities provided by MDMH to avoid harm. Williams and Conner seek reversal of summary judgment in favor of MDMH and Thornton arguing that the district court misapplied *Faragher* and *Ellerth*.

II. *Discussion*

We review the grant or denial of summary judgment de novo, applying the same standard as the district court and may affirm on grounds supported by the record. *Bechtold v. City of Rosemount*, 104 F.3d 1062, 1068 (8th Cir.1997). Summary judgment is appropriate where the record shows that no genuine issue as to any material fact exists and that the moving party is entitled to judgment as a matter of law. *Dorsey v. Pinnacle Automation Co.*, 278 F.3d 830, 834 (8th Cir.2002). "We remain mindful that summary judgment should seldom be granted in the

context of employment actions, as such actions are inherently fact based." *Mayer v. Nextel West Corp.*, 318 F.3d 803, 806 (8th Cir.2003) (citing *Keathley v. Ameritech Corp.*, 187 F.3d 915, 919 (8th Cir.1999)).

To establish a cause of action for hostile-work-environment sexual harassment, Williams and Conner must prove (1) that they belong to a protected group; (2) that they have been sexually harassed; (3) that the harassment was based on gender; (4) that the harassment was unwelcome; and (5) that the harassment affected a term, condition, or privilege of employment. *Scusa v. Nestle USA Co.*, 181 F.3d 958, 964 (8th Cir.1999). "To be actionable, harassment must be both objectively and subjectively offensive, such that a reasonable person would consider it to be hostile or abusive." *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151, 1158 (8th Cir.1999); *see also Moring v. Arkansas Dept. of Correction*, 243 F.3d 452, 455 (8th Cir.2001). It is undisputed that both Williams and Conner established a prima facie case.[4]

Because the harassment in this case was committed by an employee who supervised Williams and Conner, MDMH is vicariously liable for the harassment unless it can establish the affirmative defense established in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08, 118 S.Ct. 2275, 141

[4] Williams and Conner argue that the district court erred in holding that Miller's actions did not affect a term, condition or privilege of employment, however this is a mischaracterization of the district court's ruling. The district court specifically held that Williams and Conner established a prima facie case.

L.Ed.2d 662 (1998). *See Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir.2004).

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, *see Fed. Rule Civ. Proc. 8(c)*. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior[] and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Faragher, 524 U.S. at 807, 118 S.Ct. 2275.

The district court found MDMH established both elements of the affirmative defense and granted summary judgment. First, the court found that MDMH's "zero-tolerance" anti-harassment policy, reporting procedure, and employee training constituted reasonable actions to prevent harassment under *Faragher*. Second, the district court found that MDMH took prompt action upon notification of Miller's objectionable behavior. Finally, the district court found that Williams and Conner unreasonably delayed using MDMH's preventative or corrective processes. Over four months elapsed before MDMH became aware of Miller's conduct and then only through a report initiated by neither plaintiff but by Williams's supervisor.

Williams and Conner contend that both elements of the *Faragher/Ellerth* affirmative defense require a finding of reasonableness on the employer's and the victim's actions – questions best left to a jury to determine. While Williams and Conner concede that very few facts are in dispute, they maintain that the inferences that can be drawn from those facts remain hotly contested. Specifically, Williams and Conner argue that (1) a reasonable jury could find that MDMH's sexual harassment policy was ineffective and deficient; (2) there were material issues of fact whether there was an unreasonable delay in reporting the harassment; (3) Miller's actions created an actionable hostile work environment after the first incidents of harassment; and (4) the district court erred in holding that an employer escapes all liability when a harassed employee unreasonably delays reporting harassment.

First, Williams and Conner argue that a reasonable jury could find that MDMH's sexual harassment policy was ineffective and deficient because MDMH did very little to implement the policy; the policy failed to include a provision making it mandatory for all supervisors with knowledge of harassment to report it to those in a position to take appropriate action; the policy failed to provide for the separation of the parties involved during the investigation; and another employee's report of Miller's sexual harassment to her supervisor went unreported. As a result, according to Williams and Conner, they were justified in believing that the harassment would continue until the investigation was complete.

Williams and Conner rely on *Varner v. Nat'l Super Markets, Inc.*, 94 F.3d 1209, 1213-14 (8th Cir.1996) for their contentions. However their reliance is misplaced as

that case is factually distinguishable. In *Varner*, we held insufficient a sexual harassment policy that allowed a supervisor to remain silent notwithstanding his knowledge of incidents of sexual harassment when reporting the harassment would require the supervisor to skip steps in the employer's chain of command. *Id.* While we understood the employer's desire to utilize a chain-of-command structure, its procedure fell short of that which might absolve an employer of liability. *Id.* MDMH's policy does not encourage such a rigid chain-of-command structure and expressly permits victims of sexual harassment to skip steps in the chain-of-command when reporting sexual harassment.

MDMH's policy identifies the various employees, not just the immediate supervisor, of MDMH to whom employees may report a violation either verbally or in writing. Through its grievance procedure, the policy also provides an alternate course of complaining about prohibited behavior. The investigatory procedure provided in the policy gives employees notice of all events that will occur upon filing a complaint. Non-retaliation and zero tolerance provisions also protect employees from adverse actions resulting from their complaint. The policy adds that "[e]mployees will be reassigned if necessary," and states that the investigation will insure "confidentiality to the maximum extent possible." Like every other employee, Williams and Conner participated in the new employee orientation upon commencement of employment. The orientation covered fair employment practices and grievance procedures. Williams and Conner received and were aware of the sexual harassment policies and the employee handbook. We agree with the district court that there are

no genuine issues of material fact regarding the reasonableness of MDMH's sexual harassment policy.

Second, Williams and Conner argue that the district court erred in finding that there was no material issue of fact whether Williams and Conner unreasonably delayed reporting Miller's harassment. According to Williams and Conner, MDMH cannot show that they were unreasonable in failing to use the reporting mechanism. We disagree. Both Williams and Conner admitted that they knew Miller's conduct was inappropriate from the very first instance, yet Conner never reported the behavior to anyone. Williams reported the harassment only after she no longer worked with Miller when, four months after the fact, a supervisor pressed her for details of unspecified allegations of misconduct.

Williams and Conner both argue that their delay, or in Conner's case complete failure to report, is excused by their shame, shock and humiliation. As noted by the Seventh Circuit, "[w]hile a victim of sexual harassment may legitimately feel uncomfortable discussing the harassment with an employer, that inevitable unpleasantness cannot excuse the employee from using the company's complaint mechanisms." *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 813 (7th Cir.1999). An employee has a duty under *Ellerth* to alert the employer to any allegedly hostile environment and "an employee's subjective fears of confrontation, unpleasantness[ ] or retaliation do not alleviate the employee's duty under *Ellerth* to alert the employer to the allegedly hostile environment." *Id.* Given the nature of the allegations against Miller, it was unreasonable not to promptly report his conduct.

Williams and Conner also argue that they acted reasonably in not reporting Miller because MDMH's policy provides that an immediate investigation will be initiated within five days and, therefore, even if they had reported Miller immediately, MDMH "had five days to begin an investigation and then enough time to perform a thorough investigation before they would have taken any action against Miller." This argument does not square with the undisputed facts. Miller was put on administrative leave and a prompt investigation was begun within three days of MDMH learning of Miller's conduct.

Third, Williams and Conner argue that Miller created an actionable hostile work environment after the first one or two incidents of harassment, and thus Williams and Conner had an actionable claim from the beginning of the harassment. In *Tbdd v. Ortho Biotech, Inc.*, 175 F.3d 595, 598 (8th Cir.1999), we suggested "that a single severe act of sexual harassment can, without more, constitute a hostile work environment that is actionable under Title VII." While the issue has not been squarely addressed, "portions of the opinions in *Ellerth* and *Faragher* cast doubt on its resolution." *Id.* We noted in *Tbdd* that the *Faragher/Ellerth* "affirmative defense was adopted to avoid 'automatic' employer liability and to give credit to employers who make reasonable efforts to prevent and remedy sexual harassment." *Id.* (citation omitted). We also noted that "[the *Faragher/Ellerth*] defense, adopted in cases that involved ongoing sexual harassment in a workplace, may not protect an employer from automatic liability in cases of single, severe, unanticipatable sexual harassment unless, for example, the harassment does not ripen into an actionable hostile work environment claim

until the employer learns that the harassment has occurred and fails to take proper remedial action." *Id.*

Most recently in *McCurdy v. Arkansas State Police*, 375 F.3d 762, 768 (8th Cir.2004), we discussed the applicability of the *Faragher/Ellerth* affirmative defense in the context of a factual scenario involving a single incident of sexual harassment by an employer. We held that "the Supreme Court, in crafting the *Ellerth/Faragher* affirmative defense, did not change course in sexual harassment jurisprudence by holding employers strictly liable for single incidents of supervisor sexual harassment." *Id.* at 772. In so holding, we reasoned that "[t]o reach a conclusion that the affirmative defense is unavailable in single incident cases in which the employee takes advantage of preventative or corrective opportunities provided by the employer and the employer thereafter takes swift and effective action to avoid further offensive conduct stands the underlying policy behind the affirmative defense on its head." *Id.* We noted that "[d]enying such an employer an opportunity to avail itself of the affirmative defense, when the employer has done all that an employer could reasonably be expected to do to avoid and remedy the offending behavior, effectively creates strict liability for employers in a single incident case – contrary to the Supreme Court's holding in *Meritor* [*Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)]." *Id.* Moreover, "[t]o hold otherwise would make the promise of an affirmative defense in single incident cases not involving a tangible employment action illusory – the pragmatic result would be to hold . . . employers . . . strictly liable for all single incidents of supervisor harassment, while allowing other employers an affirmative defense for multiple and ongoing incidents of supervisor harassment." *Id.*

This case does not involve a single, severe, unanticipated act of sexual harassment. The sexual harassment in this case involved ongoing sexual harassment of exactly the type *Faragher* and *Ellerth* address. The district court did not err in applying the *Faragher/Ellerth* affirmative defense to the facts of this case.

Finally, Williams and Conner argue that the district court erred in holding that an employer escapes all liability when a harassed employee unreasonably delays reporting the harassment. This is also a mischaracterization of the district court's decision.[6] The district court granted summary judgment in favor of MDMH because the district court found that MDMH established both elements of the *Faragher/Ellerth* affirmative defense. We agree and affirm the district court's grant of summary judgment in favor of MDMH and Thornton.

COLLOTON, Circuit Judge, concurring in part and concurring in the judgment.

I concur in the judgment of the court and most of its opinion, but I would address the appellants' third argument a bit differently. The appellants argue that because the first one or two incidents of sexual harassment in this case were severe and unanticipated, they had an actionable claim from the beginning of the harassment, and the affirmative defense to liability announced in *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), should thus not be available to the employer. It

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[6] *See* footnote 2.

seems to me that the answer to the appellants' contention is not merely that this case involved ongoing harassment (as did *Faragher* and *Ellerth*) rather than a single act of harassment. *Cf. ante,* at 978-79. The Court in *Faragher* and *Ellerth* did not address an argument that either employer had created an actionable hostile work environment in the first one or two incidents of harassment, such that the employees had no opportunity to prevent the harm before it occurred. In announcing the affirmative defense under the circumstances of the *Ellerth* case, the Court seemed to contemplate that it "could encourage employees to report harassing conduct *before* it becomes severe or pervasive," 524 U.S. at 764, 118 S.Ct. 2257 (emphasis added), that is, before it is actionable. Similarly, in *Faragher,* the Court explained the affirmative defense by saying that "[i]f the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care." 524 U.S. at 807, 118 S.Ct. 2275. The defense was unavailable in *Faragher* because the employer had failed to exercise reasonable care to prevent harassment. *Id.* at 808, 118 S.Ct. 2275.

The reason why I believe the appellants' third argument fails is that it is foreclosed by our decision in *McCurdy v. Arkansas State Police,* 375 F.3d 762 (8th Cir.2004). *McCurdy* considered a question not directly addressed in *Ellerth* and *Faragher,* and held that an affirmative defense to liability is available even where a severe act of sexual harassment by a supervisor creates an actionable hostile work environment *before* the employee has an opportunity to make a complaint, as long as the employer "takes swift and effective action to insulate the complaining employee from further harassment the moment the employer learns about the harassing conduct." *Id.*

at 771. Like the plaintiff in *McCurdy*, the appellants here claim that the employer may not rely on an affirmative defense to liability (as opposed to damages) when a severe act of harassment creates an actionable work environment prior to the time when the employee reasonably could be expected to report the harassment. That argument fails in light of *McCurdy*.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

SUZZETTE WILLIAMS, et al.,	)	
Plaintiffs,	)	
v.	)	Case No.
MISSOURI DEPARTMENT OF MENTAL HEALTH, et al.,	)	02-0698-CV-W-SOW
Defendants.	)	

ORDER

Before the Court are defendants' Motion for Summary Judgment (Doc. # 25j), defendants' Suggestions in Support, plaintiffs' Suggestions in Opposition, and defendants' Reply. For the reasons stated below, defendants' motion is granted.

I. Background

Plaintiffs Suzzette Williams and Angela Conner (collectively as "Plaintiffs" and singularly as "Williams" or "Conner") have each asserted a claim for hostile work environment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, against the Missouri Department of Mental Health and Dan Thornton individually and in his official capacity as the Superintendent of the Higginsville Habilitation Center ("HHC"), operated by the Missouri Department of Mental Health (hereinafter referred to collectively as "Defendants" and singularly as "MDMH" or "Thornton"). Plaintiffs allege that they were subjected to a sexually hostile work environment at the MDMH.

Defendants have moved for summary judgment on plaintiffs' claim.

Plaintiffs were assigned as direct care staff to the Crestview II residential unit at HHC. Ronald Dale Miller ("Miller") was hired by MDMH as a Habilitation Specialist II at the HHC on April 12, 1999. Miller was assigned as a Habilitation Specialist at the Crestview II unit from March 1, 2000 through April 9, 2000. Miller was later transferred to the Crestwood II unit at HHC in Independence on April 10, 2000. Habilitation specialists supervise employees in the "Developmental Assistant I" job classification. Miller was Williams' immediate supervisor. It is disputed whether he was Conner's supervisor. Both plaintiffs allege hostile work environment stemming from inappropriate behavior by Miller on shifts that they worked with him. The relevant uncontroverted material facts relating to each plaintiff are set out below.

Suzzette Williams

Plaintiff Williams was hired by the MDMH on June 7, 1999. On June 28, 1999, Williams participated in HHC's new employee orientation, which included information on Fair Employment Practices (discrimination and sexual harassment) and Grievance Procedures. At the orientation, Williams was trained on the MDMH's sexual harassment policy and received copies of the department's Employee Handbook and sexual harassment policy. This portion of the orientation lasted for approximately one hour. It is undisputed that Williams read the sexual harassment policies for both HHC and the MDMH and the Employee Handbook. Employees who believe they have been harassed, or perceive that harassment may be

occurring in the workplace, are instructed by the department's policy to report the incident to their supervisor (unless their supervisor is the alleged offender), other manager or administrator in their section, or to the Personnel Office.

Williams was assigned as direct care staff to the Crestview II residential unit at HHC in March 2000. During March 2000, Miller was temporarily assigned to the Crestview II residential unit of HHC as well. Miller was at Crestview II for approximately one month. During that time period, Williams worked with Miller approximately ten times.

Williams alleges that about the third time she worked with Miller he began to ask her inappropriate personal questions, expose himself and touch her in private areas and that this continued on a number of occasions. Miller admits that he exposed himself to Williams on multiple occasions.

The first incident occurred when Williams was alone in the laundry room at Crestview II. Miller walked in and pulled down his pants to expose his genitals to Williams. He said, "Man, look how hard it is." Miller later exposed himself to Williams a second time that evening. On another occasion, when Williams was in a client's room, Miller came to the doorway and exposed and fondled himself in front of her and the client. Miller also approached Williams when she was on a sofa with two clients. He approached her and pulled open the neck of her blouse to look at her breasts. Another time, Miller asked Williams to go with him to the copy machine. While at the copy machine, Miller brushed up against her, touched her

breasts and exposed himself. Miller would brush up against Williams and grab her buttocks.

Williams stated that each episode of sexual misconduct by Miller occurred in front of no one except for a few clients of HHC who are incompetent to testify. Williams failed to notify the proper authorities per HHC and MDMH policy of Miller's harassment when the harassment occurred. Williams alleges that a prior history of sexual abuse influenced her decision not to report the harassment from Miller promptly.

On April 5, 2000, Williams told her teenage son about the harassment at work. Her son said he would go with her the next day to report Miller. Williams was in an automobile accident the evening of April 5, 2000 and did not return to work until after April 10, 2000. By that time, Miller was no longer working at the facility. Williams never went with her son to report Miller's conduct.

It was not until August 7, 2000, in response to her supervisor Debi Hatheway ("Hatheway") advising her to wear a bra to work, that Williams first mentioned the alleged harassment by Miller. Basically, Williams questioned whether she should be required to wear a bra when her "boss can go around and expose himself" to her. Based upon Williams' informal notification of harassment to Hathaway, the department placed Miller on administrative leave pending an investigation into Williams' allegations on August 10, 2000. On August 14, 2000 Miller resigned from the MDMH.

Angela Conner

Conner was hired by the MDMH in April of 1999. Initially Conner was assigned by the department as a CAT, but after approximately six mouths, she was placed in the Developmental Assistant I job classification. She participated in the new employee orientation at HHC on April 26, 1999. At this orientation, Conner was trained on the sexual harassment policy of the department, and received a copy of the sexual harassment policy and a copy of the MDMH Employee Handbook. This portion of the orientation lasted for approximately one hour. It is undisputed that Conner did not read the Employee Handbook, but knew there was a sexual harassment policy in place. It is undisputed that Conner knew there was a reporting procedure to use if she was being sexually harassed as an employee.

Conner was assigned as direct care staff to the Crestview II residential unit at HHC in March 2000. In March 2000, Miller was temporarily assigned to the Crestview II unit of HHC as well. Miller was at Crestview II for approximately one month. From March 1 through April 9, 2000, Conner worked with Miller on approximately twelve occasions. Beginning about the third time Miller worked with Conner, he began to expose himself, grab her in inappropriate places, and make inappropriate sexual statements. Miller admits that he exposed himself to Conner on multiple occasions.

The first incident was at Crestview II when Miller called Conner into his office and asked her to shut the door. He asked her if she "wanted to see something grow?" When Conner said, "what do you mean," Miller pulled down his pant and exposed himself. That same evening

Miller grabbed at her breasts and buttocks. On approximately three occasions, Conner and Miller were in the HHC swimming pool watching the clients. Miller would swim up behind Conner and grab her breasts and try to put his hand between her legs. On another occasion, Conner was asked to assist Miller in transporting a client in the department's van. On the ride back to the HHC, Miller, while driving, reached over and tried to pull up Conner's shirt and bra, Miller then exposed his penis and asked Conner if she would "like to see how fast a worm could grow?" During another ride, Miller groped Conner, exposed his penis and kept asking her to touch and stoke it.

Conner states that each episode of sexual misconduct by Miller occurred in front of no one except for a few clients at HHC who are incompetent to testify. It is unclear whether Miller was Conner's supervisor, but Miller stated that he did supervise her on occasion and Conner stated that Miller was the supervisor there. Furthermore, it is undisputed that habilitation specialists supervise employees in the "Developmental Assistant I" job classification.

Conner failed to notify the proper authorities per HHC and MDMH policy that she was being harassed. Conner stated that she failed to do so because she feared losing her job. Conner has acknowledged that there was a unit manager on duty during an overlapping shift to whom she could have reported the alleged harassment.

On March 30, 2000, Conner placed a bid for transfer to another facility without providing an explanation for her request. Conner then rescinded her request to transfer after Miller informed her that he was also being transferred to

the same facility. Conner's interoffice memo to her unit manager rescinding her bid to transfer provided no explanation for requesting the rescission. On April 25, 2000, Conner submitted her resignation notice and on May 12, 2000 Conner resigned from HHC. By this time she was no longer working with Miller since he had transferred to another facility on April 10, 2000. Conner subsequently filed a re-employment application for employment with HHC stating that she had resigned because she was "having problems with the babysitter."

II. Standard

A motion for summary judgment should be granted if, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Rafos v. Outboard Marine Corp.*, 1 F.3d 707, 708 (8th Cir. 1993) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). A defendant who moves for summary judgment has the burden of showing that there is no genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). A plaintiff opposing a properly supported motion for summary judgment may not rest upon allegations of her pleadings, "but must set forth specific facts showing there is a genuine issue for trial." *Id.*

III. Discussion

Each plaintiff initially asserted a claim for violation of 42 U.S.C. § 1983 based upon defendants' alleged failure to adequately screen and train supervisory employees. Conner also asserted a constructive discharge claim under

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e. Plaintiffs state in their brief to this Court that after reviewing defendants' motion and the evidence produced in discovery, they agree to voluntarily dismiss their claims under 42 U.S.C. § 1983. Further, Conner will not claim she was constructively terminated. This leaves only plaintiffs' hostile work environment claim under Title VII for the Court's consideration.

To establish a *prima facie* case of sexual harassment based on hostile work environment, each plaintiff is required to show that (1) she is a member of a protected group; (2) she was subjected to sexual harassment; (3) the harassment was based on gender; (4) the conduct was unwelcome; and (5) the harassment affected a term, condition, or privilege of employment. *Brewington v. City of Lone Jack*, 2003 U.S. App. LEXIS 25214, at *3 (8th Cir. 2003) (citing *Moring v. Ark. Dep't of Corr.*, 243 F.3d 452, 455 (8th Cir. 2001)). Only conduct that is "severe or pervasive enough to create as objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive" is actionable under Title VII. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

In this case, plaintiffs claim that Miller subjected them to a sexually hostile work environment and that MDMH is liable. "An employer is subject to vicarious liability to a victimized employee for an actionable hostile work environment created by a supervisor with immediate (or successively higher) authority of the employee." *Faragher v. City of Boca Raton*, 527 U.S. 775, 807 (1998). The Eighth Circuit has noted that the *Faragher* court did not answer the question "who is a supervisor?" *Jones v. John Morrell Co.*, 2004 U.S. App. LEXIS 438, at *5 (8th

Cir. Jan. 14, 2004). The Eighth Circuit did not disagree with the district court in *Joens* where the district court adopted the narrow answer to this question, that a supervisor "must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties." *Id.*

While it appears that plaintiffs can establish a *prima facie* case, Title VII does not automatically make employers liable for sexual harassment or discrimination by their supervisors. *Faragher*, 527 U.S. at 792. If a plaintiff establishes a *prima facie* case of sexual harassment, an affirmative defense exists which an employer may utilize to defend itself from being held vicariously liable for creating a hostile work environment based on harassment by a supervisor. *Id.* at 807; *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). To succeed with this defense, the employer must prove by a preponderance of the evidence that (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. *Id.* This affirmative defense is not available if the supervisor's harassment culminates in a tangible employment action, such as discharge or demotion. *Id.* Concerning Title VII jurisprudence, the Eighth Circuit has stated that, "[t]he Supreme Court's new affirmative defense was adopted to avoid 'automatic' employer liability and to give credit to employers who make reasonable efforts to prevent and remedy sexual harassment." *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 597 (8th Cir. 1999).

In moving for summary judgment, defendants rely on this affirmative defense. Since plaintiffs did not suffer any tangible employment actions resulting from Miller's harassment of them, MDMH is entitled to rely on this defense. While the parties dispute whether Miller was in fact Conner's supervisor, the Court will assume that he was for the purposes of evaluating defendants' motion for summary judgment.

A. Reasonable care to prevent and correct promptly any sexually harassing behavior

The first prong of the affirmative defense is whether defendant took reasonable care to prevent and correct promptly any sexually harassing behavior. As to this first element, the Supreme Court has noted that:

> While proof that an employer had promulgated an anti-harassment policy with [a] complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.

Faragher, 524 U.S. at 807.

1. Prevention of sexually harassing behavior

Defendant argues that the clear and detailed sexual harassment policy of the MDMH, as well as the contents of the employee handbook, show that the department took serious measures to prevent sexual harassment in the workplace. It is undisputed that plaintiffs participated in the new employee orientation upon commencement of their employment and received the department's sexual

harassment policies and employee handbook. Plaintiffs claim that there are inadequacies in this policy based upon the EEOC's directive regarding effective sexual harassment policies. *See EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, Sec. V(c) (June 18, 1999). Plaintiffs also rely upon the contention that where a factual issue concerning the adequacy of employer's policy exists, it is to be resolved by the jury at trial. *Gentry v. Export Packaging Co.*, 238 F.3d 842, 848 (7th Cir. 2001).

There are no set guidelines for this Court to follow to determine whether an anti-harassment policy is effective enough to constitute reasonable care to prevent sexually harassing behavior. This Court agrees with other courts that have found that the reasonableness of an employer's efforts to prevent sexual harassment in the workplace may be resolved at the summary judgment stage. *See, e.g., Leopold v. Baccarat*, 239 F.3d 243, 245 (2d Cir. 2000) (summary judgment affirmed as employer had a policy and complaint procedure in place which is enough to satisfy the first prong of the affirmative defense as long as confidentiality and non-retaliation are included); *Shaw v. Autozone, Inc.*, 180 F.3d 806, 812 (7th Cir. 1999) (summary judgment affirmed as employer exercised reasonable care when it had adopted an anti-harassment policy which set forth various mechanisms for the resolution of the complaints and where the policy was distributed to every employee).

The MDMH's sexual harassment policy defines sexual harassment and identifies various employees, including the immediate supervisor, Unit Manager, Personnel Officer, or other manager of the facility whom employees may contact to make a complaint of a violation. Plaintiffs

set forth no facts suggesting that there was not another higher employee besides Miller to whom they could make complaints of sexual harassment. In fact, Conner stated that there was another unit manager on duty during an overlapping shift to whom she could have reported the alleged harassment.

Furthermore, defendants' policy provided a grievance procedure as an alternate course of complaining about prohibited behavior. In addition to creating and distributing a written policy, MDMH reviewed this policy with new employees and provided them with copies of the policy. Both plaintiffs attended an orientation where this information was distributed. Both plaintiffs acknowledge that they had read, or were at least aware, that defendants had a policy in place.

The Court disagrees with the plaintiffs' argument that defendants' sexual harassment policy does not satisfy the first element of the affirmative defense. This policy and related training provided by MDMH shows that the department took reasonable care to prevent any sexually harassing behavior in the workplace.

2. Correction of sexually harassing behavior

The first prong of the affirmative defense requires the employer to take reasonable care to promptly correct any sexually harassing behavior. In determining whether an employer took prompt remedial action regarding an employee complaint, the court may look at the amount of time elapsed from notice to remedial action, options available to the employer (such as employee training sessions, harasser transfers, written warnings, or terminations), and whether the employer's action ended the

harassment. *Carter v. Chrysler Com.*, 173 F.3d 693, 702 (8th Cir. 1999). Summary judgment is proper where an employer took prompt remedial action after a plaintiff's complaint by interviewing the plaintiff, confronting the alleged harasser, issuing a written warning, and presenting evidence that no further harassment occurred. *Zirpel v. Toshiba American Info. Sys. Inc.*, 111 P.3d 80, 81 (8th Cir. 1997). In *Jackson v. Ark. Dep't of Educ.*, the employer satisfied the first prong of the affirmative defense when upon notification of the improper behavior, the employer took immediate action to activate its anti-harassment prevention policy to investigate the complaint and stop the behavior. 272 F.3d 1020, 1025-26 (8th Cir. 2001)

It is undisputed that the MDMH was first notified of the alleged harassment on August 7, 2000, when Williams, almost four months after the harassment ended, made a comment about Miller's actions to a supervisor Debi Hatheway. By this time, Williams no longer worked with Miller. He had transferred from Crestview II to Independence April 9, 2000. After Williams put MDMH on notice that the sexual harassment had occurred, it is undisputed that the department placed Miller on administrative leave pending an investigation into Williams' allegations. During this investigation, the MDMH interviewed both plaintiffs and Miller was notified to appear for questioning on August 16, 2000, but resigned on August 14, 2000 prior to being questioned about the allegations. Neither Williams nor Conner had worked with Miller for almost four months by the time the MDMH was made aware of the harassment. Miller was placed on leave and summoned to appear for questioning. He resigned before the department could take further action against him. There was nothing further MDMH could do at that point.

This Court finds the actions taken by the department upon notice of Miller's harassment constituted prompt remedial action under the first prong of the affirmative defense.

Since the MDMH had in place an anti-harassment policy to prevent sexual harassment in the workplace, which was disseminated to both plaintiffs, and the department exercised reasonable care to correct promptly the sexually harassing behavior of Miller, the first element of the defense is satisfied.

B. Plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm.

The department must also satisfy the second prong of the affirmative defense by showing that plaintiffs unreasonably failed to use preventive and corrective mechanisms offered by the department. *Faragher*, 527 U.S. at 807. The Supreme Court has provided a guideline for meeting the second prong:

> And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

Id. at 807-08. In *Jackson*, the employee was found to have unreasonably failed to utilize the employer's anti-harassment policy when the employee failed to report the harassment for more than nine months. 272 F.3d at 1026.

The undisputed facts establish that the department has stated a "zero tolerance" for sexual harassment. Employees who engage in sexual or other harassment in the workplace are warned that they can expect disciplinary action, up to and including dismissal. The policy further states that employees who believe they have been harassed, or perceive that they [sic] harassment may be occurring in the workplace, are instructed by the department's policy to report the incident to their supervisor. Following receipt of the complaint, the department's policy provides for an immediate and thorough investigation to be initiated within five (5) working days. If the investigator determines that sexual harassment has occurred, the facility will take action (up to and including dismissal) to ensure that the conduct is not repeated. Retaliation against employees who bring sexual or other harassment charges or act as a witness is prohibited by the department's policy, will be addressed appropriately, and may include disciplinary action against the retaliator. Therefore, the department clearly had corrective measures in place, which both plaintiffs had been trained on and were aware existed.

Plaintiffs concede that they never alerted anyone at the department to Miller's inappropriate behavior even though they knew it was wrong. An employee's "subjective fears of confrontation, unpleasantness, or retaliation do not alleviate the employee's duty under *Ellerth* to alert the employer to the allegedly hostile environment." *Shaw*, 180 F.3d at 813 (7th Cir. 1999), *cert. denied*, 528 U.S. 1076

(2000). Furthermore, discomfort with having to report harassment has been found not to relieve the employee of their obligation to report harassment to the employer so the employer may have an opportunity to respond to the harassment. *Stricker v. Cessford Constr. Co.*, 179 F.Supp.2d 987, 1011 (N.D. Iowa 2001).

Plaintiffs state that the first incident of sexual harassment by Miller occurred in early March 2000 before Miller was voluntarily transferred to Independence on April 9, 2000. It is undisputed that it was not until August 7, 2000 that Williams reported Miller's offensive conduct to a supervisor for the first time. Conner stated that she failed to report the incidents because she feared termination and Williams stated that she was "embarrassed," "shocked," and "thought it would be okay" and that her family would be upset had she reported the allegations. Plaintiffs themselves concede they could have avoided further harm had they reported Miller. Therefore, this Court believes that plaintiffs' subjective fears of reporting Miller were not justification for their failure to utilize the complaint procedures of the anti-harassment policy.

Plaintiffs argue that they only lose on the second prong of the affirmative defense if they could reasonably have avoided *all* the harm caused by Miller. Plaintiffs rely on *Faragher*, claiming that it stands for the proposition that an employer who exercised reasonable care is not liable for unlawful harassment only if the employee could have avoided *all* the actionable harm. Tellingly though, plaintiffs go on to quote from *Faragher*, which states that, "If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a

plaintiff for what her own efforts could have avoided." *Faragher*, 524 U.S. at 805. This Court believes that plaintiffs' interpretation of *Faragher* is incorrect. After much discussion that employers should not be held automatically liable for harm they did not know was occurring in the workplace, the Supreme Court did not state that *all* harm must be avoided in order for the employer to use the affirmative defense.

Plaintiffs also argue that the department is absolutely liable for the first "one or two incidents." This reasoning comes from the Eighth Circuit having noted that the affirmative defense may not protect an employer from automatic liability where there is a single, severe, unanticipated incident of sexual harassment because this one severe incident constitutes a hostile work environment that is actionable under Title VII. *Todd*, 175 F.3d at 598. Yet, this argument is predicated on plaintiffs having an actionable claim under Title VII after one incident. Plaintiffs argue that there was no additional harm that either Williams or Conner could have avoided by reporting Miller because after one or two incidents, the harm rose to the level of being egregious. Plaintiffs fail to cite to any authority for their proposition. The Court finds that plaintiffs did not have an actionable claim based on one severe incident. The first incidents included Miller exposing and fondling himself in front of them. This does not rise to the level of egregious and if reported, would have avoided subsequent *actionable* harm.

While the Court recognizes that Miller subjected plaintiffs to sexual harassment, the Court is guided by the Supreme Court's announcement of the affirmative defense in *Faragher*.

> This composite defense would, we think, implement the statute sensibly for reasons that are not hard to fathom . . . It would therefore implement clear statutory policy and complement the Government's title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty.

Faragher, 524 U.S. at 805-06. For the above reasons, the Court finds that plaintiffs unreasonably failed to take advantage of the preventative and corrective opportunities provided by the department.

IV. Conclusion

For the reasons stated above, it is hereby

ORDERED that defendants' Motion for Summary Judgment (Doc. #25) is granted as to plaintiff's claim for hostile work environment under Title VII. It is further

ORDERED that the Clerk of the Court shall enter final judgment at this time.

/s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States
District Judge

Dated: 1-30-04

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-1510

Suzzette Williams; Angela Conner,	*	
Appellants,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
vs.	*	
Missouri Department of Mental Health; Dan Thornton, Individually and in his official capacity as Superintendent of the Higginsville Habilitation Center, operated by the Missouri Department of Mental Health,	*	
Appellees.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

July 22, 2005

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
NOV 18 2005
OFFICE OF THE CLERK

No. 05-515

IN THE SUPREME COURT OF THE UNITED STATES

SUZZETTE WILLIAMS, ANGELA CONNER,
Petitioners,

v.

MISSOURI DEPT. OF MENTAL HEALTH,
Respondent.

On Writ Of Certiorari
To The Eighth Circuit Court of Appeals

BRIEF IN OPPOSITION

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

CAROLYN VASTERLING*
Chief Counsel for Litigation
HEIDI C. DOERHOFF
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102-0899
Phone: (573) 751-3321
Fax: (573) 751-9456

****Counsel of Record***

QUESTIONS PRESENTED

The district court and the court of appeals agreed that Respondent was entitled to entry of summary judgment on Petitioners' hostile work environment claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, based on the affirmative defense available under *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), to employers (a) who exercise reasonable care to prevent and promptly correct sexually harassing behavior by a supervisor (b) when an employee who has suffered no tangible employment action from the harassment unreasonably fails to take advantage of preventive or corrective opportunities to avoid harm.

The question presented is:

Whether this Court should review the judgment below where Petitioners have not identified any circuit split or that *Faragher/Ellerth* was misapplied?

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The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 407 F.3d 972. The opinion of the district court (Pet. App. 15a-32a) granting respondent's motion for summary judgment is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2005. A petition for rehearing and rehearing en banc was denied on July 22, 2005 (Pet. App. 33a). The petition for a writ of certiorari was filed on October 19, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

1.a. Petitioners Suzzette Williams and Angela Conner are former employees of the Crestview II residential unit at the Higginsville Habilitation Center (HHC), a facility that provides medical, behavioral, and habilitative training to persons with mental retardation and developmental disabilities. Pet. App. 15a. HHC is operated by respondent Missouri Department of Mental Health (Department).[1]

Williams was hired in June 1999, and Conner in April 1999. *Id.* 16a, 19a. Both participated in HHC's new employee orientation, including a one-hour training session on the Department's sexual harassment policy. *Id.* Both received a

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[1] The petition's caption indicates that there are additional respondents. There are not. Petitioners' complaint asserted claims against Dan Thornton, the Superintendent of HHC, under 42 U.S.C. §1983. But Petitioners voluntarily dismissed them. *See* Pet. App. 22a.

copy of the policy and a copy of the Department's employee handbook during the training. *Id.*

b. As the Department's sexual harassment policy states, the Department has "zero tolerance" for sexual harassment.[2] Pet. App. 29a. Employees who believe that they have been harassed or perceive that harassment is occurring are instructed to report the incident to their supervisor (unless their supervisor is the alleged offender), to another manager or administrator in their section, or to the Personnel Office. Reports may be made verbally, on the Department's sexual harassment complaint form, or through the Department's grievance procedure. *Id.*

On receipt of a sexual harassment complaint, the Department requires a thorough investigation to be initiated within five working days. Pet. App. 29a. Employees who violate the policy receive disciplinary action up to and including dismissal. *Id.* Retaliation against employees who bring sexual or other harassment charges is prohibited and can result in disciplinary action up to and including dismissal. *Id.*

At HHC, the Department's sexual harassment policy has been augmented to require that investigations "insur[e] confidentiality to the maximum extent possible" and that

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[2] The policy defines "sexual harassment" as "unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature, when: 1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; 2) submission or rejection of such conduct by an individual is used as a basis for employment decisions affecting the individual; or 3) such conduct has a purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offense work environment." R. 120.

"[e]mployees will be reassigned if necessary." R. 118.

c. From March 1, 2000 until April 9, 2000, Dale Miller, then employed as a habilitation specialist by the Department, was assigned temporarily to HHC. Pet. App. 16a. During his month at HHC, Miller worked with Williams approximately ten times. *Id.* 17a. He worked with Conner approximately twelve times. *Id.* 19a.

Starting about the third time that Miller worked with Williams, Miller began to engage in inappropriate conduct towards her, including exposing his genitals, fondling himself, touching Williams' breasts, and grabbing her buttocks. *Id.* 18a-19a. Each episode occurred while the two were alone or in the presence of residents who were incompetent to testify. *Id.* 18a.

Miller engaged in similar inappropriate conduct toward Conner, again, starting about the third time that he worked with her. *See id.* 19a-20a (exposed genitals, grabbed at Conner's breasts and buttocks, and made inappropriate sexual statements). As with Williams, each episode occurred while the two were alone or in the presence of residents incompetent to testify. *Id.* 20a.

On April 10, 2000, Miller was transferred to another facility and did not work with Williams or Conner thereafter. *Id.* 16a.

d. On April 5, 2000, Williams told her teenage son about Miller's harassment. *Id.* 18a. Her son said that he would go with her the next day to report Miller. *Id.* But later that evening, Williams was injured in a serious automobile accident and did not return to work until April 10, 2000, after Miller left HHC. *Id.* Williams never went with her son to report Miller's conduct or otherwise reported Miller's behavior as provided by the Department's sexual harassment policy. *Id.*

Conner never reported Miller's harassment either, even though there was a unit manager on duty during an overlapping

shift to whom she could have spoken. *Id.* 20a. On March 30, 2000, Conner placed a bid for transfer to another facility, but did not provide an explanation for her request. *Id.* After Miller told Conner that he was being transferred, she rescinded her request, again without providing a reason. *Id.* 20a-21a. In May 2000, about a month after Miller's transfer, Conner resigned from HHC. *Id.* 21a. She later filed a re-employment application that stated that her resignation was due to "problems with the babysitter." *Id.*

e. The Department and HHC first became aware of Miller's misconduct on August 7, 2000 – approximately four months after Miller's transfer. Pet. App. 18a. That day, Williams' supervisor Debi Hatheway spoke to Williams about the need to wear a bra to work. *Id.* Williams asked why she needed to wear a bra when her "boss can go around and expose himself" to her. *Id.* Hatheway inquired further, and Williams told her about the incidents with Miller. *Id.*

Hatheway promptly reported Williams' allegations to the Department. *Id.* 4a. On August 10, 2000, Miller was placed on administrative leave pending an investigation. *Id.* 18a. During the investigation, Williams, Conner, and other employees were interviewed. Miller was scheduled to be interviewed by the investigators on August 16, 2000, but he resigned on August 14, 2000, before any internal action was taken. *Id.*[3]

In addition to the incidents involving Williams and Conner, the investigation revealed that Miller had touched C.E., another employee, on one occasion shortly before his transfer;

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[3] The petition states incorrectly that Miller admitted that he repeatedly exposed himself "[d]uring the investigation." Pet. 6. Miller admitted the misconduct when he was deposed in the instant litigation.

that C.E. told him to leave her alone; and he did. R 349-50.

The investigation also brought to light that Williams had told four coworkers about Miller's behavior; that two of these coworkers had encouraged Williams to report him; and that sometime after Miller's transfer, C.E. had told Sara Moore, a habilitation specialist and C.E.'s personal friend, that Miller had touched her, but C.E. had asked Moore not to report the matter. R. 350.

2.a. Williams and Conner sued the Department for a hostile work environment claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq*.[4] The Department moved for summary judgment based on the affirmative defense available under *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), to employers (i) who exercise reasonable care to prevent and promptly correct sexually harassing behavior by a supervisor (ii) when an employee who has suffered no tangible employment action from the harassment unreasonably fails to take advantage of preventive or corrective opportunities to avoid harm.[5]

Petitioners opposed the Department's motion, asserting, *inter alia*, that the Department's sexual harassment policy was inadequate because it failed to assure confidentiality and that

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[4] The complaint also asserted a Title VII constructive discharge claim on behalf of Conner, which was voluntarily dismissed. Pet. App. 22a.

[5] The Department disputes that Miller was Conner's supervisor. The district court and the court of appeals assumed, but did not decide, that Miller supervised Conner for purposes of evaluating the Department's summary judgment motion. *See* Pet. App. 2a n.2 & 24a.

their failure to report Miller's conduct was not unreasonable in light of sexual abuse they had suffered as children. *See* Pet. 4-5. Both conceded, however, that they were aware of the Department's policy and could have avoided further harm had they utilized it. Pet. App. 30a. Williams admitted, moreover, that she "felt safe enough to report [Miller's misconduct]" if accompanied by her teenage son, despite her childhood experience. Pet. 4.

b. The district court granted the Department's motion, concluding that there were no genuine issues of material fact regarding the reasonableness of the Department's sexual harassment policy or the unreasonableness of Williams' delay, and Conner's failure, to report the incidents with Miller notwithstanding any subjective fears stemming from their childhood abuse. Pet. App. 15a-32a.

c. The court of appeals affirmed. While recognizing that summary judgment was "seldom" appropriate in employment actions, the court agreed that it was properly entered in this case. Pet. App. 4a. After a careful review of the Department's policy, the panel unanimously held that the policy satisfied the first prong of *Faragher/Ellerth*'s affirmative defense as a matter of law because (i) it did not encourage a rigid chain-of-command structure for reporting complaints; (ii) it provided alternative reporting mechanisms, such as through its grievance procedure; (iii) its non-retaliation and zero-tolerance provisions protected employees from adverse actions resulting from a complaint; (iv) it provided for reassignment of employees if necessary; and (v) its investigatory procedure gave employees clear notice of all events that would occur on the filing of a complaint. *Id.* 8a.

The panel also agreed unanimously that there was no material issue as to whether Williams and Conner unreasonably delayed reporting Miller's harassment. *Id.* 9a. Taking into consideration all of the circumstances and "the nature of the